PEMBINAAN JO TAR (SARAWAK) SDN BHD

v.

TECHNISYSTEM (M) SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[SUIT NO: 22-264-99-III (II)]
6 OCTOBER 2004

CIVIL PROCEDURE: *Amendment - Defence - Whether application bona fide - Whether defendant delayed in making application - Whether prejudice to plaintiff could be compensated by costs - Rules of the High Court 1980, O. 20 r. 5*

CIVIL PROCEDURE: *Pleadings - Amendment of defence - Whether application bona fide - Whether defendant delayed in making application - Whether prejudice to plaintiff could be compensated by costs - Rules of the High Court 1980, O. 20 r. 5*

This was an application by the defendant to amend para. 15 of the statement of defence by deleting, *in toto*, the said paragraph principally on the grounds that: (i) the amendment sought was for the purpose of correcting an error in the pleadings and to clarify the issues to be determined at trial; (ii) the amendment sought would cause no prejudice to the plaintiff which could not be compensated by costs; and (iii) the amendment sought was *bona fide*. The issue before the court was whether the court should grant the defendant leave to amend its statement of defence.

Held (dismissing the application):

[1] On the facts, the defendant had neither produced sufficient material nor provided cogent reasons for this court to exercise its discretionary power to allow the amendment sought. Although the defendant had been candid enough to admit its mistake, leading the defendant to admit that para. 15 of the defence had been erroneous, such an admission only came about after a witness of the plaintiff had testified and the plaintiff had rested its case. If the defendant were *bona fide* in their application, it should have been aware of such a matter before and would probably have found that such an averment need not have been pleaded in the first place. Furthermore, the defendant had delayed in making the application to amend considering that: (a) the pleadings had closed in March 2000; (b) the parties had the bundle of documents in December 2000; (c) witnesses' statements were exchanged prior to the trial; and (d) the plaintiff had also closed its case. (p 272 e-h)

[2] In addition, the parties could not agree on a statement of agreed issues to be tried as directed by the court during the pre-trial case management stage but had individually framed their respective issues to be tried. Against this backdrop, it was premature for the court at this stage to decide whether the delay of the sub-contractor ('LKJ') was relevant or otherwise to the plaintiff's claim since the defendant was still adducing evidence at the examination-in-chief stage. Finally, even if it was a factual error, there was nothing wrong with the defendant letting it remain without amending it since it was its contention that LKJ's delay in completing the sub-contract works was irrelevant. However, should the court allow the amendment when the plaintiff had rested its case at this stage, it would prejudice the plaintiff, and this could not be compensated by costs. (p 273 a-g)

Case(s) referred to:
Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(foll)***
Taisho Co Sdn Bhd & Anor v. Pan Global Equities Bhd [1999] 1 CLJ 703 CA ***(foll)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 5

Other source(s) referred to:
Gatley on Libel, 9th edn, 1998, p 447

For the plaintiff - KC Wong; M/s KC Wong & Assoc
For the defendant - James Lo; M/s George Lo & Partners

Reported by Suresh Nathan

JUDGMENT

Lau Bee Lan JC:

Background

Vide a summons in chambers' application dated 3 September 2004, the defendant has applied to amend the defence (encl. 65) principally on the grounds:

(a) the amendment sought is for the purpose of correcting an error in the pleadings and to clarify the issues to be determined at trial;

(b) the amendment sought will cause no prejudice to the plaintiff which cannot be compensated by costs; and

(c) the amendment sought is *bona fide*.

(hereinafter referred to as "the defendant's application").

The defendant's application is essentially to amend para. 15 of the statement of defence by deleting the said paragraph in toto which reads:

> The letter from the Consultant dated 31.12.1996 referred to in paragraph 13 of the claim shows that the works were completed 16 months later than the completion date (31.8.1995) stipulated in the Defendant's letter dated 17.04.1995.

The defendant's application came about at the stage after the plaintiff has closed its case and when proceedings are at the stage of the examination-in-chief of Mr. Frederic Jean Louis Julien Martareche, the sole witness for the defendant.

The issue before the court is whether the court should grant the defendant leave to amend their statement of defence.

Findings And Evaluation

The governing provision upon which the defendant's application is premised is O. 20 r. 5 of the Rules of the High Court ("RHC"). This said provision has been interpreted by the Federal Court in the case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 cited by learned counsel for the defendant. In the aforesaid case, the Federal Court sets out three criteria:

(a) whether the application was *bona fide*;

(b) whether the prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

Of pertinence too are the two cases of *Taisho Co. Sdn. Bhd. & Anor v. Pan Global Equities Bhd.* [1999] 1 CLJ 703 and *Raphael Pura v. Insas Bhd. & Anor* [2000] 4 CLJ 830 cited by the learned counsel for the plaintiff. His Lordship Haidar JCA (delivering the judgment of the Court of Appeal in both instances) had in *Raphael Pura*'s case, which dealt with an application for the amendment of defence at stated that the question posed in *Yamaha*'s case would apply. His Lordship further stated that if the application of the appellant showed lack of *bona fide* then he fails in his application altogether and it is for the appellant asking the court to exercise discretionary power in his favour to place some material and advance some cogent reasons to impel the court to lean on his side.

Additional principles for the court to bear in mind are those contained in a passage from *Gatley on Libel* (9th edn, 1998) under the caption, 'Granting of leave in discretion of court' at p. 447 quoted by His Lordship as follows:

> *It has been held that where delay has been due to the defendant's own default in some respect, that circumstance should be taken into consideration by the judge as part of the matters to be weighed in deciding whether or not to allow an amendment. The mere fact that delay may be capable of being compensated in money is not conclusive of the question whether the amendment should or should not be permitted* (*Bower v. Maxwell,* unreported, 8 May 1989, 89/472 (CA)). (emphasis added)

Having established the principles wherein this court is bound to follow, I now turn to the facts of the case.

The defendant's application is supported by the affidavit in support of Frederic Martareche, Managing Director of the defendant's company (DW) affirmed on 26 August 2004 and the reasons averred by the said deponent which I reproduce as follows:

> (1) The defendant **had discovered factual errors** in para 26 of my Witness Statement and para 15 of the Defence. The period of 16 months therein was counted from the contractual completion date for the sub-contract Works (31 August 1995) to the date of the Consultant's letter (31 December 1996), when the contractual completion date for the sub-contract Works should have been 27 May 1995 and the actual completion date for the overall project Works was 31 October 1996. (para 4).
>
> (2) However, having explained the factual error, I then tried to explain that the plaintiff's witness Mr. Kuan was right, when he said during trial, that the **Consultant's letter does not, of itself, prove how many months LKJ's Works were delayed** (because the LKJ sub-contract, which was only part of the whole project, would have finished before the overall completion mentioned in the Consultant's letter). (para 5).
>
> (3) Having acknowledged that Mr. Kuan was correct, I then said that it **would be irrelevant to the present trial to look at the number of months LKJ was delayed in completion of his sub-contract works.** I said that, irrespective of the length of the delay, the consequence of LKJ's delay is that the defendant can deduct LD (Liquidated Damages) from LKJ's sub-contract monies. (para 6).

(4) The defendant **cannot do a mechanical correction of the obvious errors in para 15 of the Defence** (by inserting 31 October 1996 as the actual completion date for the overall contract and 27 May 1995 as the contractual completion date for the sub-contract) because this would still not allow the defendant to conclude that LKJ's sub-contract Works were 17 months late. As I have said, the plaintiff's witness was right on that score: we cannot compute the number of months LKJ was delayed without any evidence on the actual completion date of the sub-contract. (para 7).

(5) Therefore **no amendment can be done to para 15 of the Defence that would enable it to state the number of months by which LKJ had delayed** the sub-contract Works. (para 8). (emphasis added)

Based on the above grounds, it is the defendant's contention that the amendment sought is *bona fide* with the view to correct a genuine mistake which the defendant only discovered in the midst of the trial and which will not cause prejudice to the plaintiff which cannot be compensated in the costs.

On the other hand, the plaintiff *vide* the affidavit in opposition affirmed by Kuan Jiew Jin (PW) on 28 September 2004 opposed the defendant's application strenuously by deposing the following:

(1) ... I say that it is not true that the Defendant had discovered factual errors in paragraph 26 of Frederic Martareche's statement and paragraph 15 of the Defendant's Defence. *The truth is*

(i) *it is stated lons before the trial in my witness statement that the Defendant's Defence in paragraph 15 is false, frivolous and vexations and*

(ii) *it is only after I have testified and explained the falseness of the Defendant's defence in paragraph 15 of the Defendant's Defence and in paragraph 26 of Frederic Martareche's witness statement that the Defendant is now trying to retract its witness statement in paragraph 26 and to delete paragraph 15 of its Defence. I verily believe such attempt is not bona fide and it is a tactical maneuver.* (para 3).

(2) ... *It is not correct to allege it is irrelevant for the present Court to determine the number of days or month LKJ was alleged to have delayed in the completion of the sub-contract works*. Without any knowledge or determination of the alleged delays of days or month of LKJ's work how is the Defendant able to claim for the amount of the liquidated damages. (para 4).

(3) *... the Defendant has in fact no evidence whatsoever on the alleged delay by LKJ* and as such the *allegation pleads in paragraph 15 of the Defence was and still is false, frivolous, vexatious which the Defendant well knew and now attempt to have it withdrawn.* (para 5).

(4) ... I say that paragraph 15 of the Defence should not be deleted as it shows clearly the Defendant's defence is not *bona fide* and is frivolous and vexatious. (para 6).

(5) ... I verily believe *the defendant's intended amendment is not bona fide and is made at a very late stage of the present proceeding especially after the Plaintiff had closed its case*. The defendant's application for leave to amend should be disallowed. (para 7).

(6) I also verily believe the *intended amendment is not substantiated and will prejudice the Plaintiff which could not be compensated with costs*. (para 8).

(7) I am advise and verily believe the *Defendant's purported amendments is an after thought and has prejudiced* the Plaintiff which could not be compensated by costs. (para 9). (emphasis added)

Having considered the facts of the case, I have asked myself whether the defendant has produced sufficient material and given cogent reasons for me to exercise my discretionary power to allow the amendment sought. I conclude in the negative. Although the defendant has been candid enough to admit their mistake as alluded before, which led the defendant to admit that para 15 of the defence is erroneous, such admission only came about after PW has testified and the plaintiff has rested its case. In my view if the defendant were *bona fide* in their application, defendant should have been aware of such a matter before and probably find that such an averment need not have been pleaded in the first place.

Further, as pointed out by the learned counsel for the plaintiff, the defendant has delayed in making the application to amend considering that:

(a) the pleading has closed in March 2000 and

(b) the parties had the Bundle of Documents in December 2000 and

(c) witness statements were exchanged prior to the trial and

(d) the plaintiff has in fact also closed its case.

In addition, I am conscious of the fact that the parties could not agree on a statement of agreed issues to be tried as directed by the court during the pre-trial case management stage but the plaintiff and defendant had individually framed their respective issues to be tried as per encl. 60 and encl. 59. And it is pertinent to note that the issues for trial identified by the defendant, *inter alia*, are:

6) Does the defendant's letter to the plaintiff dated 17.4.1995 constitute:

a) a new and unconditional contract supported by consideration and enforceable by the plaintiff, which obliges the Main Contractor (the defendant) to release retention monies to the Sub Sub Contractor (the plaintiff) regardless of whether any set-offs or deductions may be made against the Sub Contractor (LKJ); or

b) at best, a conditional agreement subject to the Supplementary Agreement between LKJ and the defendant dated 15.6.1995 which provides, *inter alia*, that retention monies would not be released until after deduction for repayment of Advances and Liquidated Damages due from LKJ to the defendant; or

c) read in the context of the defendant's letter to LKJ dated 6.4.1995, nothing more than a consent by the defendant to assist with direct payment to the plaintiff by deduction from any monies due to LKJ?

Against this backdrop, notwithstanding what DW averred that it is irrelevant at this trial to look at the number of months LKJ was delayed in completion of his sub-contract works, I am of the view it is premature for the court at this stage to decide whether LKJ's delay is relevant or otherwise to the plaintiff's claim since the defendant is still adducing evidence at the examination-in-chief stage.

Finally, even if it is a factual error as averred by the DW, what is wrong for the defendant to let it remain without amending it since it is their contention that LKJ's delay in completion of his sub-contract works is irrelevant. However, should the court allow the amendment when the plaintiff has rested their case at this stage, it would, in my view, prejudice the plaintiff which cannot be compensated with costs.

Under the circumstances, I dismiss the defendant's application with costs to be taxed unless otherwise agreed.